No. 90-1551

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In The

Supreme Court of the United States

October Term, 1990

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, THEODORE B. GOULD, MIAMI CENTER CORPORATION and CHOPIN ASSOCIATES,

Debtors,

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, THEODORE B. GOULD, MIAMI CENTER CORPORATION and CHOPIN ASSOCIATES,

Petitioners,

vs.

FRED STANTON SMITH, as Trustee of the Miami Center Liquidating Trust, and the BANK OF NEW YORK,

Respondents.

BRIEF OF FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION FOR REVIEW

Where the confirmed and substantially consummated plan of reorganization provides for the Bank of New York to receive post-petition interest on its claim even though the order of confirmation states the bank is undersecured, and the bank received the post-petition interest in 1985, did the Eleventh Circuit Court of Appeals err in affirming the district court's dismissal as moot of the action for a declaratory judgment on the question of whether the bank was undersecured and thus not entitled to post-petition interest?

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STATUTES AND CONSTITUTIONAL PROVISIONS

11 U.S.C. Section 363(m) Use, sale, or lease of property.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. Section 506 Determination of secured status.

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use or on a plan affecting such creditor's interest.

(b) To the extent that an alleged secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable,

necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void unless –

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

11 U.S.C. Section 1127(b) Modification of plan.

(b) The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

U.S. Const. Art. III, Section 2

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two

> or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> * * *

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, *Holywell Corp. v. Bank of New York*, No. 88-5770 slip op. (11th Cir. Jan. 9, 1991), appears at App. A at 1a;[1] The decision of the United States District Court for the Southern District of Florida, *Holywell Corp. v. Smith*, No. 88-151 slip op. (S.D. Fla. July 21, 1988), appears at App. B at 3a; and the decision of the United States Bankruptcy Court for the Southern District of Florida, *Smith v. Bank of New York*, No. 87-0523 slip op. (Bankr. S.D. Fla. Dec. 18, 1987) appears at App. C at 10a.

JURISDICTION

The Court lacks jurisdiction over the Petition for Writ of Certiorari because the issue of whether the Bank of New York was entitled to post-petition interest is moot. The Eleventh Circuit's decision of January 9, 1991 to that effect does not conflict with any decision of this Court or the courts of appeals, and does not present an important

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[1] References to the Appendix attached to the Debtor's Petition for Writ of Certiorari will be by the symbol "App. ___."

question of federal law which has not been, but should be settled by this Court. *See* S.Ct.R. 10.1(a)-(c).

STATEMENT OF THE CASE

Respondent Fred Stanton Smith, Trustee of the Miami Center Liquidating Trust (hereinafter "Liquidating Trustee"), filed an adversary proceeding against the Bank of New York (hereinafter "bank") and the Debtors[2] in which the Liquidating Trustee sought declaratory relief on the question of whether the bank was undersecured and thus not entitled to post-petition interest.[3] The matter was tried before the bankruptcy court, which held that the bank was not an undersecured creditor. App. C at 10a.

The district court reversed, holding that the bankruptcy court should have dismissed that portion of the adversary complaint as moot in light of the Eleventh Circuit's decision in *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 123, 109 S.Ct. 69, 102 L.Ed.2d 46 (1988), dismissing as moot the Debtor's appeal of the confirmation order. The

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[2] The Debtor-Petitioners are Theodore B. Gould and four entities he entirely owns or controls – Holywell Corporation, Miami Center Limited Partnership, Miami Center Corporation and Chopin Associates. *See Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547, 1548 (11th Cir.), *cert. denied*, 488 U.S. 823, 109 S.Ct. 69, 102 L.Ed 2d 46 (1988).

[3] The Liquidating Trustee also sought a determination of adjustments to the purchase price of the Miami Center.

district court reasoned that the plan allowed for the payment of post-petition interest to the bank, and that "it is no longer appropriate for the bankruptcy court to re-visit the substantive merits of the confirmed plan. The overarching meaning of the Eleventh Circuit's opinion is that it will not countenance the 'piecemeal dismantling' of the plan. 838 F.2d at 1555. Consequently, the question of whether [the bank] was 'entitled' to obtain the $27 million [representing post-petition interest] is no longer subject to adjudication." App. B at 8a.

The Debtors appealed to the Eleventh Circuit, which affirmed and stated:

> This appeal is one of a seemingly unending stream of appeals arising out of the Chapter 11 bankruptcies of several debtors involved in the Miami Center project. The general background of the project is described in our previous opinions and will not be repeated here. *See e.g., Miami Center Ltd. Partnership v. Bank of New York,* 838 F.2d 1547 (11th Cir.), *cert. denied,* 488 U.S. 823, 109 S.Ct. 69 (1988).
>
> In this appeal, appellants challenge a $27 million credit received by the Bank of New York toward the purchase price of the project. This credit was part of the now substantially consummated plan of reorganization, and appellants' challenge thus is moot. *See id.* This appeal therefore is DISMISSED.

App. A at 2a. The Eleventh Circuit also found the Debtors' appeal to be "frivolous." *Id.*

FACTS

This is the Debtors' tenth attempt at review in this Court – eight have been unsuccessful,[4] and one, only recently filed, has not yet been decided.[5]

The Debtors were the developers of the Miami Center, a hotel and office building complex in downtown Miami. They filed voluntary Chapter 11 petitions in 1984 shortly after the bank instituted foreclosure proceedings. At that time, the Debtors owed some $350 million to over 400 creditors, with the bank being their largest creditor. *Miami Center*, 838 F.2d at 1548.

In 1985, the bankruptcy court confirmed a plan of reorganization proposed by the bank.[6] Its central features were:

> (a) Substantive consolidation of the Debtors' bankruptcy estates;
>
> (b) the creation of the Miami Center Liquidating Trust, consisting of all of the Debtors' assets as defined by 11 U.S.C. Section 541(a), including the Miami Center and proceeds from the pre-confirmation sale of other realty;
>
> (c) appointment of a trustee of the Miami Center Liquidating Trust;

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[4] Case numbers 87-1988, 87-1989, 88-80, 89-864, 89-708, 89-917 and 90-676.

[5] Case Numbers 90-1361, 90-1484.

[6] The Debtors' creditors overwhelmingly approved the bank's plan over one proposed by the Debtors. *See Miami Center*, 838 F.2d at 1548.

(d) the purchase of the Miami Center by the bank for $255.6 million, to be paid by cancellation of the Debtors' obligations to the bank (some $242 million), plus a cash payment of $13.6 million; and

(e) the bank's release to the trust of approximately $30 million in cash collateral, representing proceeds from the pre-confirmation sale of other realty.

The bankruptcy court confirmed the plan in August, 1985. *See Holywell Corp. v. Bank of New York*, 54 Bankr. 41 (Bankr S.D. Fla. 1985). Curiously, the order confirming the plan stated the bank was undersecured, yet the plan which it confirmed expressly provided for the bank to receive post-petition interest. Liquidating Trustee's App. A at 1a.[7]

When the Debtors failed to post a supersedeas bond, the plan was implemented according to its terms on October 10, 1985 with the sale of the Miami Center to the bank for $255.6 million, the price set by an MAI appraisal. *Miami Center*, 838 F.2d at 1549. At the closing, the bank received a $27 million credit, representing post-petition interest provided for in the plan.

Prior to confirmation of the plan, the bankruptcy court entered its Judgment Determining Amount, Validity and Extent of Liens of the Bank of New York, in which the court found the bank's lien included the right to post-petition interest. That order fixed the bank's mortgage

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[7] References to the appendix attached hereto will be by the symbol "Liquidating Trustee's App. ___."

lien at $234 million, plus accruing interest. Trustee's App. B at 5a-6a.

The bank's collateral securing its loans to the Debtors included the Miami Center (with an MAI appraised value of $255.6 million), approximately $30 million, representing the proceeds from the sale of other realty, and the stock of the Debtors' wholly-owned subsidiary corporations. *See Holywell Corp.*, 59 Bankr. at 352.

The Debtors previously argued in a separate appeal to the district court that " . . . the Bank is – and has consistently admitted it is *over*secured by virtue of the current value of the hotel and office building alone." Liquidating Trustee's App. C at 9a.

In its dismissal of the Debtors' appeal from the order of confirmation, the Eleventh Circuit concluded that it is "legally and practically impossible to unwind the consummation of the plan or otherwise to restore the status quo before confirmation." *Miami Center,* 838 F.2d at 1557. In so holding, that court noted:

> The bank agreed to give up its judgment, calculated at closing at around $242 million. The amount due under the mortgage and brought forward into the judgment was calculated at "good standing" interest rates; by agreeing to this calculation, the bank surrendered a claim to $5 million-$6 million of interest at default rates. Presumably if the sale goes for naught the bank would be entitled to this additional amount.
>
> Closing the sale to the bank stopped the running of interest of approximately $2 million per month. If the sale goes for naught, presumably the bank can seek interest from October, 1985, producing an accrual when Judge

Aronovitz entered his March 1986 order of approximately $11 million and currently approximately $54 million.

The bank bargained for and purchased the FF & E as part of the sale. Because litigation was in progress over whether title to the FF & E was in lessors of the bankrupt, the bank put up $14 million to pay the lessors if they prevailed. But, since the bank would then have paid twice for the same assets, it was given a trustee's certificate enforceable against assets of the estate to protect it from the double payment. Without the trustee's certificate, if double payment ensues, the bank will become an unsecured creditor to the extent of some $14 million. The debtors do not suggest any relief for this risk.

The bank put up $12.5 million of its own money to make up the purchase price. It surrendered $30 million of cash collateral it was holding. These funds have been the primary source for payments to creditors and reserves totaling approximately $30 million. The trustee appeared before the district court when, after remand, it heard argument. He pointed out that he had paid some $14 million in claims, had reserved some $9 million for claims disputed or in litigation, and held some $8 million-$9 million in cash plus some $7 million in a reserve for contested taxes. The trustee pressed his view that the reorganization plan had to be accepted or rejected in its entirety and that rejection would require him to seek to reclaim what he had paid out, much of which was unrecoverable.

The bank might, of course, not wish to become purchaser of the property at an elevated price or to assume the risk of paying twice for FF & E. It might wish to realize on the cash collateral it had held and to foreclose on the real estate. The debtors have not given a meaningful

> suggestion of how the bank can get back its $12.5 million or get back the $30 million cash collateral; they say only that creditors have some or all of it and are entitled to be paid and that the trustee need not seek to recover back from them.
>
> The bank bargained for dismissal of the separate suit as part of the consideration running to it. The debtors want the case reinstated but do not point to any means of restitution to the bank for being again placed at risk of a fraud/RICO case and subjected to attorney fees for its defense.

Miami Center, 838 F.2d at 1556.

The Eleventh Circuit thereafter dismissed the appeal of the confirmation order as moot, and this Court denied both certiorari and mandamus. *Miami Center Limited Partnership v. Bank of New York*, 488 U.S. 823, 109 S.Ct. 69, 102 L.Ed.2d 46 (1988); *In re Gould*, 69 S.Ct. 148 (1988).

In order to clarify the apparent inconsistency between the statement in the confirmation order that the bank was undersecured with the plan provision allowing post-petition interest, the Liquidating Trustee filed an adversary complaint seeking declaratory relief on the question of whether the bank was, in fact, undersecured and therefore, not entitled to post-petition interest. *See* 11 U.S.C. Section 506(b). The bankruptcy court determined the bank was not undersecured. App. C at 10a.

The Debtors appealed to the district court, which dismissed the appeal as moot because the confirmed and substantially consummated plan of reorganization provided for the bank to receive post-petition interest, and the terms of the plan could not be revisited. The district

court determined that the Eleventh Circuit's dismissal of the appeal of the confirmation order as moot precluded review of this latest challenge to the plan of reorganization. App. B at 8a. The Eleventh Circuit thereafter affirmed. App. A at 1a.

As part of their effort to obtain certiorari, the Petitioners have attempted to create an artificial link between this petition and the petitions they and the United States of America filed from an unrelated Eleventh Circuit decision holding that the Liquidating Trustee is not responsible for certain federal income taxes. *United States v. Smith*, 911 F.2d 1539 (11th Cir. 1990). In that tax decision, the Eleventh Circuit held the trust is not responsible for taxes incurred, if any, on gain from the sale of the Debtors' realty because the plan did not provide for such taxes and because the Miami Center Liquidating Trust is not a taxable entity. 911 F.2d at 1542-47. The Petitioners in this case argue they are trying to recoup for the Miami Center Liquidating Trust the post-petition interest paid to the bank in order to create a fund for the payment of those alleged taxes. This argument presumes both that the trust owes these taxes and that the amount of the taxes has been liquidated. Neither is true. Even in the event this Court were to reverse the Eleventh Circuit's tax decision, that decision has no bearing on whether certiorari should issue in this case. The issue here is not whether there is a need to create a fund to pay an unproven tax liability, but whether the determination, *vel non* of the bank's undersecurity is moot and, therefore, unreviewable.

SUMMARY OF ARGUMENT

The doctrine of mootness is well established and has been uniformly applied by this Court and the courts of appeals. The Petitioners entirely fail to demonstrate the existence of a conflict between the Eleventh Circuit's application of the mootness doctrine and the law of this Court or other courts of appeals.

The Petitioners' argument that the Eleventh Circuit exceeded its authority in applying the mootness doctrine is entirely without merit. Whether an issue can be rendered moot is appropriately left for courts to decide. It is not a decision for Congress to legislate since its application requires a live case or controversy pursuant to Article III of the Constitution. The Petitioners imply that this issue is an important question of federal law which has not been, but should be settled by this Court, but they cite no authority to support this position.

In addition, the argument is no more than a subtle attempt to reargue their earlier failure to obtain certiorari review of the Eleventh Circuit's dismissal of their appeal of the confirmed plan of reorganization as moot. The issue is barred by the doctrine of *res judicata*. Certiorari should not be granted to collaterally challenge prior court orders which are otherwise unreviewable.

It is the law of this case that the confirmed plan provides for the payment of post-petition interest. That interest was paid in 1985 when the bank took a credit at the closing of the sale of the Miami Center, pursuant to the plan. These facts cannot be undone, and the courts cannot now modify the confirmed and substantially consummated plan.

ARGUMENT

I.

REASONS FOR DENYING THE WRIT

A.

The Eleventh Circuit's Decision Does Not Conflict With Existing Law

The Petitioners have failed to demonstrate the existence of a conflict between the Eleventh Circuit's decision and any other decision of this Court or other courts of appeals.

Reliance on *In re Joshua Slocum Ltd.*, 922 F.2d 1081 (3rd Cir. 1990) as a basis for conflict jurisdiction fails because a plain reading of the case demonstrates no conflict exists. In fact, *Joshua Slocum* represents the traditional analysis given mootness questions, and its facts are entirely distinguishable.

In that case, paragraph 20 of the debtor's lease with the landlord allowed either of them to terminate the lease if the debtor's annual sales fell below a certain figure, and provided further that the debtor would pay additional rent if gross sales reached a certain figure. *Joshua Slocum*, 922 F.2d at 1084. After the debtor filed for bankruptcy protection, the trustee moved for authority to assume and assign the lease under 11 U.S.C. Section 365, and to excise paragraph 20 of the lease. The bankruptcy court granted the motion over the landlord's objections and the trustee assigned the lease to a third party free of the obligations imposed by paragraph 20. *Id.* The court subsequently held paragraph 20 be to unenforceable. *Id.* The landlord appealed, arguing the issue was whether the bankruptcy court had the power to excise a paragraph

from a lease. 922 F.2d at 1083. The trustee argued the appeal was moot pursuant to 11 U.S.C. Section 363(m) because the landlord did not obtain a stay and the lease had already been assigned. 922 F.2d at 1085.

The court held the case was not moot, and agreed with the landlord that the issue was not over the lease assignment, but whether the bankruptcy court had authority to change the terms of the lease when authorizing its assignment. 922 F.2d at 1085. The trustee *conceded* that Bankruptcy Code Section 363(m) does not apply to assignments of leases, and the court refused to extend the applicability of that section to assignments. *Id.*

The Third Circuit stated that "[w]e have been willing to go beyond the statutory framework and dismiss an appeal as moot, where, *during the pendency of the appeal*, events occurred preventing the appellate court from granting effective relief." *Id.* (emphasis appears in original). The Court held, however, that "there was no intervening event that altered the rights of the Trustee *vis-a-vis* [the landlord]." 922 F.2d at 1086. "The action the Trustee claims to have mooted, i.e., the assignment of the lease, is not the action appealed from and not the action upon which we base our decision. The excisement of paragraph 20 is the action presently before us, and the Trustee has presented no argument to the effect that the issue has been mooted during the pendency of the appeal. **Thus, effective relief can be granted in this case.**" *Id.* (emphasis supplied).

Petitioners contend that the court in *Joshua Slocum* declined to follow the Eleventh Circuit's prior decision

dismissing as moot the Debtors' appeal of the confirmation order (Petition for Writ of Certiorari at 20), and then claim the majority in *Joshua Slocum* rejected the dissent's reliance on *Miami Center*, 838 F.2d at 1553 – the same decision the Eleventh Circuit held was controlling in this case. This argument has no merit, for the majority in *Joshua Slocum* stated:

> While we are essentially in agreement with the dissent's well-reasoned analysis, we differ as to the appropriate starting point of the inquiry. If we started the analysis with the assignment, and not with excisement of paragraph 20, we would probably reach the same result.

922 F.2d at 1086. The *Joshua Slocum* court further stated: "Nor do we, in this opinion, overturn 'a transaction that has long since been consummated,' dissenting opinion at 1093 . . . " 922 F.2d at 1086 n. 2.

Clearly then, *Joshua Slocum* fails to demonstrate the existence of any conflict with the Eleventh Circuit's decision concluding that any issue concerning the confirmed plan's provision for post-petition interest is now moot. In this case, no effective relief could be granted because, *inter alia*, the transaction has long since been consummated. Moreover, in the decision dismissing the Debtors' appeal of the confirmation order, the Eleventh Circuit held: "Section 363(m) does not apply where the debtor's assets have been sold, as here, by a liquidating trustee pursuant to a plan of liquidation. *All parties agree that in this case we look for guidance to the case law.*" *Miami Center*, 838 F.2d at 1553. Thus, the Petitioner's argument that the Eleventh Circuit unlawfully extended Section 363(m) (and their reliance on *Joshua Slocum*) is misguided. As

was conceded in the appeal of the confirmation order, whether the appeal is moot is based on case law; that law unequivocally supports the application of the mootness doctrine in this case, as discussed more fully, *infra*.

B.

The Petition For Writ Of Certiorari Is A Collateral Attack On The Confirmed Plan

There is no doubt that in filing this petition for writ of certiorari, the Debtors seek another chance to challenge the confirmed and substantially consummated plan of reorganization. The claim that they do not seek to undo the sale of the Miami Center, which was mandated by the plan, rings hollow, for to set aside the payment of post-petition interest undoes the plan in a piecemeal fashion. The Debtors cannot pick and choose which aspects of the plan should stand and which should fail.

The Eleventh Circuit's decision in *Miami Center* is controlling in this case. The district court's determination that the issue of the bank's entitlement to post-petition interest should be dismissed as moot says it clearly and needs no further elaboration:

> The final opinion by the Eleventh Circuit makes it crystal clear that it is no longer appropriate for the bankruptcy court to revisit the substantive merits of the confirmed plan. The overarching meaning of the Eleventh Circuit's opinion is that it will not countenance the 'piecemeal dismantling' of the Plan. 838 F.2d at 1555. Consequently, the question of whether [the bank] was 'entitled' to obtain the $27 million credit is no longer subject to adjudication.

> Whether or not [the bank] was 'entitled' to obtain the credit for post-petition interest, the credit is now lawful in the sense that it is an integral component of the confirmed Plan . . . . The Plan unmistakably provided for [the bank] to have a credit for interest and expenses accruing through the date of closing, and the closing statement itself specifically provided for '[i]nterest to October 9, 1985.'
>
> Although the credit itself is not subject to collateral attack at this late date, the validity of the credit under Section 506(b) as a matter of law must remain unanswered.

App. B at 8a.

It is well-settled principle that a confirmed and substantially consummated plan cannot be modified. *See* 11 U.S.C. Section 1127(b); *In re Seminole Park & Fairgrounds, Inc.*, 505 F.2d 1011, 1014 (5th Cir. 1984); *Claybrook Drilling Co. v. Divanco, Inc.*, 56 Bankr. 55, 57 (Bankr. D. Me. 1985); *In re Northampton Corp.*, 59 Bankr. 963, 968-69 (E.D. Pa. 1984); *In re Hayball Trucking, Inc.*, 67 Bankr. 681, 684 (Bankr. E.D. Mich. 1986); *In re AT of Maine, Inc.*, 56 Bankr. 55 (Bankr. D. Me. 1985); *In re Heatron*, 34 Bankr. 526 (Bankr. W.D. Mo. 1983). The confirmed plan, which provides for post-petition interest, is the law of this case and is binding on the Debtors. *Miami Center, supra; see also In re St. Louis Freight Lines, Inc.*, 45 Bankr. 546, 551 (Bankr. E.D. Mich. 1984).

The relief the Debtors seek strikes at the core of the plan, and "must be set against what the bank bargained for, and received, as part of the reorganization plan. . . ." 838 F.2d at 1556. In its analysis of this aspect of the mootness issue in the Debtors' appeal of the confirmation

order, the Eleventh Circuit found ample support for its conclusion which is equally applicable to this appeal:

> The bank agreed to give up its judgment, calculated at closing at around $242 million. The amount due under the mortgage and brought forward into the judgment was calculated at good standing interest rates; by agreeing to this calculation the bank surrendered a claim of $5 million – $6 million of interest at default rates. Presumably if the sale goes for naught the bank would be entitled to this additional amount.
>
> Closing the sale to the bank stopped the running of interest at approximately $2 million per month. If the sale goes for naught, presumably the bank can seek interest from October, 1985, producing an accrual when Judge Aronovitz entered his March 1986 order of approximately $11 million and currently approximately $54 million.

838 F.2d at 1556.

Indeed, the bank might never have proposed the plan of reorganization unless it were allowed payment of post-petition interest. The Eleventh Circuit has already held that the "bankruptcy court did not err in finding, and the district court did not err in affirming, that the plan had been substantially consummated and its fairness, feasibility, and propriety had been verified, and that it had become legally and practically impossible to unwind the consummation of the plan or otherwise restore the status quo before confirmation." *Miami Center*, 838 F.2d at 1557. Thus, the issue of whether the bank was undersecured is now moot because there is no longer any way to fashion meaningful relief.

The Debtors make their now shop-worn argument that the provisions of a confirmed plan must comply with applicable statutory requirements, and that the failure to comply in this case means the bank is not entitled to post-petition interest. This argument is entirely without merit in light of the fact that any present attack on the merits of the plan is moot. *See Miami Center, supra.* All of the arguments the Debtors have concerning the terms of the sale of the Miami Center, which is governed exclusively by the confirmed plan, were or should have been raised in their appeal of the order of confirmation. To do so now demonstrates a studied disregard of this Court's prior denial of certiorari and mandamus from the Eleventh Circuit's dismissal of the appeal of the confirmation order as moot.

The Debtors bandy numbers in an attempt to show that the bank was undersecured and thus not entitled to post-petition interest. These calculations are not the subject of any court order and are clearly beyond the scope of the record. They are *dehors* the record and should be treated accordingly. *See Harmelin v. Michigan,* 59 U.S.L.W. 3324 (October 30, 1990). All of the challenges to the plan are over.

C.

The Question Of Whether The Bank Of New York Is Undersecured And Therefore Not Entitled To Post-Petition Interest Is Moot

Any contention that the Eleventh Circuit extended Section 363(m) in derogation of the law and that only

Congress can extend a statute is also moot, for the premise is not open for review. The issue concerning the bank's entitlement to interest is moot.[8]

Bankruptcy law is well established that an appeal of an order approving a sale may be dismissed as moot when the sale has been consummated and the court can no longer grant effective relief. *See In re Stadium Management Corp*, 895 F.2d 845 (1st Cir. 1990); *Kaonohi Ohara, Ltd. v. Sutherland*, 873 F.2d 1302 (9th Cir. 1989); *In re Onouli-Kona Land Co.*, 846 F.2d 1170 (9th Cir. 1988); *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 841 F.2d 92 (4th Cir. 1988); *In re Sun Valley Ranches, Inc.*, 823 F.2d 1373 (9th Cir. 1987); *Matter of Andy Frain Services, Inc.*, 798 F.2d 1113 (7th Cir. 1986); *In re Sax*, 796 F.2d 994 (7th Cir. 1986); *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir. 1984); *In re AOV Industries, Inc.*, 792 F.2d 793 (9th Cir. 1981); *Matter of Combined Metals Reduction Co.*, 557 F.2d 179 (9th Cir. 1977). Absent a stay of the order confirming a sale, the court must dismiss as moot a pending appeal challenging the sale once it becomes final. The court has no effective remedy available even if it would have determined the issues differently. *See, e.g., Stadium Management*, 895 F.2d at 847. In other words, there is no longer a case or controversy ripe for judicial review. *See, e.g., Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 1951, 23

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[8] Judicial power to hear a case depends on the existence of a case or controversy, pursuant to Article III, Section 2 of the United States Constitution. *See Liner v. Jafco, Inc.*, 375 U.S. 301, 84 S.Ct. 391, 11 L.Ed.2d 347 (1964). There is simply no case or controversy after substantial consummation of the plan and in light of the Eleventh Circuit's decision in *Miami Center*.

L.Ed.2d 491, 502 (1969)(Mootness occurs when the issues presented are no longer "live.")

While former Bankruptcy Rule 805 governing mootness was not carried forward into Bankruptcy Rule 8005 in 1983, the Bankruptcy Code nonetheless provides that once a plan of reorganization has been substantially consummated, it cannot be modified. *See* 11 U.S.C. Section 1127(b).

The Debtor-Petitioners also complain that the mootness doctrine is not fair as applied to them because they could not afford to post the $140 million bond required to obtain a stay (the bond was reduced to $50 million by the district court). But fairness dictates that finality be applied to what did happen. The Debtors owed over $350 million to over 400 creditors when they sought protection in the bankruptcy court. The creditors overwhelmingly approved the bank's proposed plan of reorganization over one proposed by the Debtors. *Miami Center*, 838 F.2d 848. The bankruptcy court approved the plan and the district court affirmed the confirmation order on the merits in a comprehensive decision. *See Holywell Corp. v. Bank of New York*, 54 Bankr. 41 (Bankr. S.D. Fla. 1985), *aff'd*, 59 Bankr. 340 (S.D. Fla. 1986), *vacated with instructions to dismiss as moot sub nom, Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823, 109 S.Ct. 69, 102 L.Ed.2d 46 (1988). That plan has been substantially consummated and is therefore no longer subject to challenge. The even-handed application of the mootness doctrine outweighs the Debtors' one-sided view of 'fairness.'

D.

The Doctrine Of *Res Judicata* Bars Granting The Writ

The doctrine of *res judicata* bars the issue of whether it was error for the Eleventh Circuit to extend Bankruptcy Code Section 363(m) to render moot an appeal of a confirmation order approving a sale of the Debtors' property.

As applied, *res judicata* means that "a party who has had a full opportunity to present a contention in court ordinarily should be denied permission to assert it on some subsequent occasion." Hazard, *Res Nova in Res Judicata*, 44 S.Cal.L.Rev. 1036 (1971). In other words, final judgment on a claim precludes a second action on that claim or any part of it. C. Wright, *Law of Federal Courts* 680 (4th Ed. 1983); *SeaLand Services, Inc. v. Gaudet*, 414 U.S. 573, 578-79, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974).

The Debtors' claim that they are not trying to undo the sale of the Miami Center to the bank, but only trying to recover a wrongfully paid credit for post-petition interest given the bank at the closing on the sale, is disingenuous. The confirmed plan, whether properly or not, provided for the bank to receive post-petition interest. That plan has been confirmed and substantially consummated. In the instant case, the Debtors now seek to change the terms of the sale and thus the terms of the confirmed plan.

This Court held in *Federated Department Stores v. Moitie* that a "final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." 452 U.S. 394, 398, 101 S.Ct. 2424, 2427, 69 L.Ed.2d 103 (1981). This rule extends to all issues relevant to the claim

between the parties, regardless of whether raised in the first proceeding. *See Kaspar Wire Works, Inc. v. Leco Engineering & Machinery,* 575 F.2d 530, 535 (5th Cir. 1978). "The bar extends not only to the precise legal theory presented in the previous litigation, but to all legal theories and claims arising out of the same 'operative nucleus of fact.' " *Olmstead v. Amoco Oil Co.*, 725 F.2d 627, 632 (11th Cir. 1984), *quoting Lovely v. Laliberte,* 498 F.2d 1261 (1st Cir.), *cert. denied,* 419 U.S. 1096, 95 S.Ct. 526, 42 L.Ed.2d 316 (1974).

The Debtors have already had a full opportunity to argue that the doctrine of mootness did not bar their challenge to the terms of the confirmed plan of reorganization in the appeal of the confirmation order. The Eleventh Circuit rejected that argument and this Court denied certiorari. *Miami Center, supra.* In *Moitie,* Chief Justice Rehnquist stated that "we do not see the grave injustice which would be done by the application of accepted principles of res judicata. 'Simple justice' is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities of a particular case." 452 U.S. at 401, 101 S.Ct at 2429.

The question of whether it was not fair for the bank to receive post-petition interest under the plan is not open for further review. The plan provided for such interest and it is no longer subject to challenge. The district court recognized this in its dismissal of the Debtors' appeal:

> Whether or not [the bank] was 'entitled' to obtain the credit for post-petition interest, the

> credit is now lawful in the sense that it is an integral component of the confirmed Plan. The Eleventh Circuit has declared that '[t]he bankruptcy court did not err in finding, and the district court did not err in affirming, that the plan had been substantially consummated and that its fairness, feasibility, and propriety had been verified. . . . ' 838 F.2d at 1557. The Plan unmistakably provided for the bank to have a credit for interest and expenses accruing through the date of closing, and the closing statement itself specifically provided for '[i]nterest to October 9, 1985.'
>
> Although the credit itself is not subject to collateral attack at this late date, the validity of the credit under Section 506(b) as a matter of law must remain unanswered.

App. B at 8a. The Debtors' failure to raise the issue in their appeal of the confirmation order precludes them from raising it now.

CONCLUSION

For all of the reasons set forth herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 90-1551

In The

Supreme Court of the United States

October Term, 1990

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, THEODORE B. GOULD, MIAMI CENTER CORPORATION and CHOPIN ASSOCIATES,

Debtors,

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, THEODORE B. GOULD, MIAMI CENTER CORPORATION and CHOPIN ASSOCIATES,

Petitioners,

vs.

FRED STANTON SMITH, as Trustee of the Miami Center Liquidating Trust, and the BANK OF NEW YORK,

Respondents.

APPENDIX TO BRIEF OF FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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APPENDIX A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CHAPTER 11 Proceedings

IN RE:	)	CASE NOS.
HOLYWELL CORPORATION, et. al.	)	84-01590-BKC-TCB
	)	84-01591-BKC-TCB
	)	84-01592-BKC-TCB
Debtors	)	84-01593-BKC-TCB
	)	84-01594-BKC-TCB

AMENDED CONSOLIDATED PLAN OF REORGANIZATION PROPOSED BY THE BANK OF NEW YORK

Bank, The Bank, BNY: The Bank of New York.

Bankruptcy Code or Code: Title 11 U.S.C. Sections 101 *et seq.*

Bankruptcy Rules: The Bankruptcy Rules as prescribed by the Supreme Court of the United States, to take effect on August 1, 1983.

BNY Debt: The indebtedness, including interest at the pre-default contract rate to January 31, 1984 and at the post-default contract rate from February 1, 1984, due to BNY from MCLP and Chopin in the amount of approximately $234,342,743 as of March 14, 1985 plus expenses of approximately $1,611,563 to March 14, 1985.

BNY Holywell Loan: The $1,750,000 loan made by BNY to Holywell on October 23, 1983, which loan was guaranteed by Gould, plus interest to October 23, 1983 to August 31, 1984 at the pre-default contract rate and from September 1, 1984 at the post-default contract rate.

Claim: Any right to payment or right to an equitable remedy for breach of performance if such breach gives rise to a right to payment against any of the Debtors in existence on or as of their respective Petition Dates as described in Section 101(4) of the Code.

IV. MEANS FOR EXECUTION OF THE PLAN

Sale of Miami Center

The Plan would be implemented by a sale of Miami Center to BNY or its designee for a purchase price of $255,600,000 pursuant to a contract of sale substantially in the form of Exhibit A annexed hereto (the "Contract of Sale"). Within 5 business days after the Effective Date, the Trustee and BNY or its designee would execute the Contract of Sale, which requires a closing of title within 45 days after the effective Date.

The purchase price would be paid and applied in the following manner:

> (a) BNY would receive a credit for the amount of the BNY Debt plus expenses to the Miami Center Closing Date, which, assuming a closing date of June 1, 1985, and no change in BNY's Prime Rate, would be $236,587,618.
>
> (b) BNY would pay the balance of the purchase price in cash (approximately $19,012,382) to the Trustee. The Trustee shall be required to: (i) pay (if requested by BNY, under protest) from such cash the real estate taxes for 1983 and 1984, and pay the Debtors' pro rata portion of

* * *

APPENDIX B

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CHAPTER 11

IN RE: HOLYWELL CORPORATION, et al., Debtors.	CASE NOS. 84-01590-BKC-TCB 84-01591-BKC-TCB 84-01592-BKC-TCB 84-01593-BKC-TCB 84-01594-BKC-TCB
THE BANK OF NEW YORK, a New York banking corporation, Plaintiff, vs. THEODORE B. GOULD, individually, as partner of CHOPIN ASSOCIATES, a Florida general partnership, and as a general partner of MIAMI CENTER LIMITED PARTNERSHIP, a Florida limited partnership; MIAMI CENTER CORPORATION, a Florida corporation, as partner of CHOPIN ASSOCIATES, and as general partner of MIAMI CENTER LIMITED PARTNERSHIP; and HOLYWELL CORPORATION, a Delaware corporation, Defendants.	ADV.NO. 85-0160-BKC-TCB-A JUDGMENT DETERMINING AMOUNT, VALIDITY, AND EXTENT OF LIENS OF THE BANK OF NEW YORK

THIS CAUSE came to be heard on March 14, 1985 upon the Complaint of The Bank of New York (the "Bank") to determine the amount, validity, and extent of the Bank's mortgage liens. Having reviewed the pleadings and heard argument of counsel, it is hereby ORDERED and ADJUDGED that:

1. This Court has jurisdiction to hear and determine this cause pursuant to 28 U.S.C. §§ 157(B)(2)(K) and 1334, and has jurisdiction over the parties.

2. The Bank is a New York banking corporation located in New York, New York, and is a secured creditor of the Debtors as set forth in Proofs of Claim filed on December 20, 1984 in case numbers 84-01590-BKC-TCB, 84-01591-BKC-TCB, 84-01592-BKC-TCB, 84-01593-BKC-TCB and 84-01594-BKC-TCB.

3. Defendants, Theodore B. Gould ("Gould") and Miami Center Corporation, A Florida corporation ("MCC"), are the sole partners of defendant Chopin Associates, a Florida general partnership ("Chopin") and are the sole general partners of defendant Miami Center Limited Partnership, a Florida limited partnership ("MCLP").

4. Defendant, Holywell Corporation ("Holywell"), is a Delaware corporation with its principal place of business in Arlington, Virginia.

5. Gould, MCC, Chopin, MCLP and Holywell are the Debtors in the above-styled proceedings, having filed voluntary petitions in this Court under Chapter 11 of the Bankruptcy Code on August 22, 1984.

6. Chopin is the fee owner and MCLP is the ground lessee and the owner of all improvements and personal property on the real estate located in Miami, Dade County, Florida ("Miami Center Phase I"), as described in the loan documents attached to the Bank's Complaint in this action.

7. The due execution, delivery, recording, and authenticity of the notes, mortgages, and other loan documents is not in dispute.

8. The Bank advanced to the Debtors under the terms of the notes and mortgages the sum of $196,711,481.58, all of which is secured by the mortgages.

9. The Bank notified the Debtors by letter that the loans were in default at all times after January 31, 1984.

10. Accrued interest on the loans, determined by the Bank at the "contract" (good standing) rate, to March 14, 1985 is $33,103,184.24, and is secured by the Bank's mortgages. Based on a Prime Rate of 10.5% per annum, interest will accrue at $64,171.66 per day from March 14, 1985. Any change in the prime rate (whether up or down) will affect that daily interest figure.

11. Additional accrued interest on the loans, determined by the Bank, commenced February 1, 1984. That additional default interest of $4,528,077.11 is payable to March 14, 1985, and is secured by the loan documents. Based on a prime rate of 10.5% such default interest will accrue in the additional amount of $11,148.50 per day under the loan documents for each day from March 14, 1985 (for a total daily sum of $75,320.16). Any change in

the prime rate (whether up or down) will affect that daily interest figure.

12. The Bank claims additional amounts under the liens of the mortgages for pre-petition legal and loan expenses, totalling $831,563.72. The Court reserves ruling on whether all or some part of such legal and loan expenses should be added to the mortgage lien.

13. The lien of The Bank of New York in and to the Debtors' real and personal property identified in the loan documents as against the Debtors is superior to any other claim or interest of the Debtors in and to said real and personal property.

14. This Court will retain jurisdiction to grant such further relief as may be necessary and proper.

15. The Court finds and decides that the total lien of the Bank (including default interest from February 1, 1984) is $234,342,742.93 to March 14, 1985, plus per diem interest from March 14, 1985, at the rate of $75,320.16 per day.

16. This Final Judgment is subject to the Court's Order, dated March 20, 1985, respecting the scope of the 1983 and 1984 releases executed by the Debtors.

DONE and ORDERED in Chambers at Miami, Florida, this 20 day of March, 1985.

THOMAS C. BRITTON
UNITED STATES
BANKRUPTCY JUDGE

cc: S. Harvey Ziegler, Esq.
Vance E. Salter, Esq.
Fred H. Kent, Jr., Esq.
Irving M. Wolff, Esq.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, THEODORE B. GOULD, CHOPIN ASSOCIATES, HOLYWELL CORPORATION, Appellants, v. BANK OF NEW YORK, Appellee.	Bk Nos. 84-01590-BKC-TCB 84-01591-BKC-TCB 84-01592-BKC-TCB 84-01593-BKC-TCB 84-01594-BKC-TCB No. 85-3225-Civ-Aronovitz

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO GRANT PARTIAL STAY PENDING APPEAL AND TO DETERMINE APPROPRIATE SIZE OF SUPERSEDEAS BOND

Holywell Corporation, Miami Center Limited Partnership, Miami Center Corporation, Chopin Associates and Theodore B. Gould, Debtors in Possession (collectively referred to as the "Debtors"), file this Memorandum of Law in support of their motion for a partial stay pending appeal of the implementation or enforcement of the Amended Consolidated Plan of Reorganization, as modified by the Second Amendment to the Amended Plan (the "Plan") of the Bank of New York (the "Bank"), and for a determination that it is not necessary for Debtors to post a bond in excess of $30 million to obtain the stay. The Debtors originally moved for a stay pending appeal in the Bankruptcy Court. The Bankruptcy Court granted the motion for a stay, but required as a condition to the stay that Debtors post a bond of $140 million.

* * *

hotel and office building over the next year. *Id.* It presented no evidence to support this claim except to mention that Holywell had made $3 million in loans to the hotel, which was erroneously assumed to be for operating losses. Stay Transcript at 51, 54. Debtors explained that the $3 million loan that the hotel had was for capital improvements to the hotel, not operating losses. Stay Transcript at 95-96. See p. 6 *supra*.

The Bank added its figures up and came to $144 million, which the Bankruptcy Court essentially accepted without question since it set a bond of $140 million.

3. The Fallacies in the Bank's Calculations

It would be difficult to judge which of the figures cited by the Bank in its calculations is the most specious, in as much as each one is more fanciful than the next. One may begin by noting that $45 million of the sum – which is the total amount of undisputed claims *and* the disputed claims at full face value, plus interest – is damage that can easily be avoided, obviating the need for a bond. One of the Debtors, Holywell Corporation, is holding over $28 million in cash in bank deposits which have been frozen by the Bankruptcy Court and held as "cash collateral" for the Bank. Though this is "cash collateral" for the Bank, it is superfluous because the Bank is – and has consistently admitted it is – *over*secured by virtue of the current value of the hotel and office building alone. The Bank has no need whatsoever for the Holywell cash as security. There is no better evidence for this than the fact that *the Bank's Plan*

* * *

III. CONCLUSION

For the reasons set forth above, the Debtors respectfully request that the Court grant their motion for a partial stay pending appeal of the decision of the Bankruptcy Court confirming the Bank's Plan, to provide that the Debtors remain in possession and control of their property, that the Trustee may not assume possession and control of the Debtors' property and affairs; and to provide that they not be required to post a bond in excess of $30 million. Debtors further request that the stay without bond now in effect be continued for sufficient additional time to enable them to obtain such a bond. In the alternative, if this Court requires a bond in excess of $30 million, Debtors request that the stay without bond be continued for sufficient additional time so that they may appeal such decision to the United States Court of Appeals for the Eleventh Circuit.

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